Nos. 454 & 455.

Brief of Gearin for Appl.

# Supreme Court

Filed Sept. 7th, 1897.

## OF THE UNITED STATES.

THE EASTERN OREGON LAND COMPANY,
*Appellee,*
vs.
E. I. MESSINGER,
*Appellant,*
455

AND

THE EASTERN OREGON LAND COMPANY,
*Appellee,*
vs.
JOHN D. WILCOX,
*Appellant.*
454

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

## Appellant's Brief.

JNO. M. GEARIN,
Attorney of Appellant.

PORTLAND, OREGON.
MARSH PRINTING CO., PRINTERS, 120-122 FRONT ST., COR. WASHINGTON.
1897.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1897.

THE EASTERN OREGON LAND COMPANY, *Appellee*,

vs.

E. I. MESSINGER, *Appellant*,

AND

THE EASTERN OREGON LAND COMPANY, *Appellee*,

vs.

JOHN D. WILCOX, *Appellant*.

BRIEF AND PRINTED ARGUMENT SUBMITTED BY STIPULATION UNDER RULE 20, RULES OF THE SUPREME COURT.

These are appeals from the decrees of the United States Circuit Court of Appeals, for the Ninth Circuit, of date February 23rd, 1897, which decrees reversed the decrees of the Circuit Court of the United States for the District of Oregon of date January 5th, 1897, and directed the said Circuit Court to enter a decree in complainant's favor in each case. The suits in the Circuit Court were to procure a cancellation of two United States patents—one to appellant Messenger, and the other to appellant Wilcox—for certain lands described in the bills. Both cases are presented here together, as they were in the Court of Appeals, by stipulation of parties. The cases are identical, except that in the case against Wilcox the land in dispute is situate more than twenty and less than forty miles from the line of the Northern Pacific Company's railroad, as designated on the map of general

route of said road filed by said company August 13th, 1870, and that in the case against Messenger the land is situated less than twenty miles from said line.

It is alleged in both bills of complaint that the lands embraced in these patents lie within the limits of the lands granted to the State of Oregon by act of Congress of February 25, 1867, for the construction of a wagon road from Dalles City on the Columbia River, to a point on Snake River, opposite Fort Boise, in Idaho Territory.

That on October 20th, 1868, the legislature of the State of Oregon granted to the Dalles Military Road Company all lands, rights of way, rights and privileges pledged to the State of Oregon by said act of Congress, and designated the Dalles Military Road Company as the company to receive said grant. That prior to June 23d, 1869, the Dalles Military Road Company surveyed and definitely located the line of its wagon road between the points and upon the route designated in said act of Congress and in said act of the legislative assembly of the State of Oregon, and completed said road, and the same was approved and accepted by the governor of the State of Oregon.

That The Dalles Military Road Company, on the 31st day of May, 1876, sold said land grant to Edward Martin, and that the complainant, the Eastern Oregon Land Company, by mesne conveyances became the purchaser of said land grant from Edward Martin.

These facts are all admitted in the answers. But it is alleged by appellants that at the time of the passage of the act of Congress on the 25th day of February, 1867, the lands in dispute were not public lands subject to grant by Congress, inasmuch as they had prior to that time, to wit, on the 2nd day of July, 1864, been granted to the Northern Pacific

Railroad Company, and that therefore as to these lands The Dalles Military Road Company took nothing by the act of Congress of February 25th, 1867, or act of the Legislative Assembly of the State of Oregon of October 20th, 1868.

It is admitted by the appellees that in the case of the Company against Messenger the land in controversy is situated within twenty miles of the line of the Northern Pacific Company's railroad as designated on the map of the general route of said road, filed by said company August 13th, 1870; and that in the case against Wilcox the land is situated more than twenty miles and less than forty miles from said line.

After the passage of the act of Congress of September 29th, 1890, entitled, "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and other purposes," a large body of land including the land in dispute, was thrown open to settlement, and on the 28th day of September, 1894, the United States sold to John D. Wilcox the land claimed by him, and on that day executed to him a patent therefor, and on the 17th day of August, 1891, sold to E. T. Messenger the land claimed by him and executed to him a patent for the same.

The Circuit Court held that the lands in controversy, being within forty miles of the line of the Northern Pacific Railroad Company's road, as shown upon its map of general route, were not public lands subject to grant by Congress February 25th, 1867, and that consequently neither the State of Oregon nor The Dalles Military Road Company took any title to or interest in said lands by said act, and dismissed complainant's bills. The Court of Appeals reversed these decrees, and directed the lower court to grant decrees in favor of complainant in each case. From such holding these appeals are taken.

The legislation referred to in the bill and necessary to be considered in this case is as follows:

Congress passed and the President approved, on July 2d, 1864, an act entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern route." (13 U. S. Statutes, p. 365).

The portions of said act material to be considered herein are:

Sec. 3. And be it further enacted: that there be and hereby is granted to the Northern Pacific Railroad Company its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public lands not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile, on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emptions or otherwise claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office: And whenever prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in

lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act. Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections, nearest to the line of said road may be selected as above provided: And provided further, That the word 'mineral," when it occurs in this act, shall not be held to include iron or coal: And provided further, That no money shall be drawn from the treasury of the United States to aid in the construction of the said Northern Pacific Railroad."

Sec. 4. And be it further enacted: That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in

all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company *confirming to said company the right and title of said lands*, situated opposite to, and coterminus with said completed section of said road, and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of road is completed as aforesaid; provided, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota until the whole of said railroad shall be finished and in good running order as a first class railroad from the place of beginning on Lake Superior to the western boundary of Minnesota

* * * * * *

Sec. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; (b) and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company, as provided by this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, shall be, and

the same *are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company.* And the reserved alternate sections shall not be sold by the Government at a price less than *two dollars and fifty cents per acre when offered for sale.*

Sec. 8. And be it further enacted, That each and every grant, right and privilege herein, are so made and given to and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the fourth day of July, Anno Domini 1876.

Sec. 9. And be it further enacted that the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same upon the further condition, that if the said company make any breach of the conditions hereof and allow the same to continue for upwards of one year, then in such case, at any time thereafter, the United States by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road.

On April 10, 1869, the following joint resolution was adopted. (16 Stat. U. S., p. 57):

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Northern Pacific Railroad Company be and hereby is authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions; and said Company in respect thereto, being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional or amendatory thereof, provided that said company shall not be entitled to any subsidy in money, bonds or additional lands of the United States, in respect to such extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension, as it may be located; and provided further that at least twenty-five miles of said extension shall be constructed before the 2d day of July, 1871, and forty miles per year thereafter until the whole of said extension shall be completed."

On May 31, 1870, Congress adopted the following joint resolution. (16 U. S. Stat., p.378):

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Northern Pacific Railroad Company be and hereby is authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on the property and rights of property of all kinds and de-

scriptions, real, personal and mixed, including its franchises as a corporation; and as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; also to locate and construct under the supervisions and with the privileges, grants and duties provided for in this act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled under the directions of the Secretary of the Interior to receive so many sections of land belonging to the United States, and designated by odd numbers in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter as will make up such deficiency on said main line or branch except mineral, and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, subsequent to the passage of the act of July 2, 1864, and that twenty-five miles of said main line between its western terminus and the City of Portland, in the State of Oregon, shall be completed by the 1st day of January, A. D. 1872, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points, etc."

On February 25, 1867, Congress passed and the President approved "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River."

Section 1 of said act is as follows:

"That there be and hereby is granted to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, by way of Camp Watson, Canyon City, and Mormon or Humboldt Basin, to a point on Snake River opposite Fort Boise, in Idaho Territory, alternate sections of public lands designated by odd numbers to the extent of three sections in width on each side of said road; provided, That the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses. And provided further, That any and all lands heretofore reserved to the United States or otherwise appropriated by act of Congress or other competent authority, be and the same are hereby reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same in which case the right of way to the width of one hundred feet is granted. And provided further, That the grant hereby made shall not embrace any mineral lands of the United States."

On September 29, 1890, Congress passed and the President approved an act entitled "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes." (26 U. S. Statutes, p. 496):

The following sections of said act are material in this case:

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That there is hereby forfeited to the United States, *and the United States hereby resumes the title thereto*, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminus with the portion of any railroad not now completed and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain; Provided, That this act shall not be construed as forfeiting the rights of way or station grounds of any railroad company heretofore granted.

Sec. 5. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the "Harrison line," being a line drawn from Wallula, Washington, easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section twenty-seven (27), in township seven (7) north, of range thirty-seven (37) east of the Willamette Meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July 1, 1885, or who at said date were in possession of any portion of said lands, or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved, from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to

the public domain by the provisions of this act, at the rate of two dollars and fifty cents per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: Provided, That the rights of way and riparian rights heretofore attempted to be conveyed to the City of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August 8, 1885, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the Legislative Assembly of the State of Oregon, approved November 25, 1885, providing for the means to supply the City of Portland with an abundance of good, pure and wholesome water over and across the following described tracts of land: Sections nineteen (19) and thirty-one (31), in township one (1) south, of range six (6) east; sections twenty-five (25), thirty-one (31), thirty-three (33) and thirty-five (35), in township one (1) south, of range five (5) east; sections three (3) and five (5), in township two (2) south, of range five east; section one (1), in township two (2) south, of range four (4) east; sections twenty-three (23), twenty-five (25) and thirty-five (35), in township one (1) south, of range four (4) east, of the Willamette Meridian, in the State of Oregon, *forfeited by this act* are hereby confirmed unto the said City of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore described strip of land, over and across the above described sections, for the purpose of constructing, maintaining and repairing a water-pipe line aforesaid.

Sec. 6. *That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any state or corporation to which lands may have been granted by Congress, except as herein otherwise provided;* nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to an uncompleted road,and hereby forfeited,within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line.

The Northern Pacific Railroad Company filed two maps of its road relating to these lands.

First—The map of March 6, 1865: "The Perham map, Exhibit "B." The letter of Josiah Perham, president of the Northern Pacific Railroad Company accompanying this map, together with the letter from the Secretary of the Interior, transmitting the same to the Commisioner of the General Land Office, and the Commissioner's reply, are to be found on pp. 64 to 72, Transcript of Record herein.

Second—The map of August 13, 1870, pleaded in complainant's bill, pp. 22 and 23, Abstract Record.

## ARGUMENT.

It is urged in the brief filed by appellee in this case that appellee in any view of the matter, was entitled to "notice" under the provisions of Section 5 of the act of Congress, entitled "An Act to provide for the adjustment of land grants made by Congress *to aid in the construction of railroads*, and for the forfeiture of unearned lands, and for other purposes," approved March 3d, 1887.

But this position is not correct. That was a piece of legislation referring exclusively to land grants *to aid in the construction of railroads*. It is so liminted in the title. Sections one (1) and two (2) of the act are as follows:

"Section 1. That the Secretary of the Interior be and is hereby authorized and directed to immediately adjust in accordance with the decisions of the Supreme Court *each of the railroad land grants* made by Congress to aid in the construction of railroads, and heretofore unadjusted.

"Section 2. That if it shall appear upon completion of such adjustments respectively, or sooner, that lands have been from any cause heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States, *to aid in the construction of a railroad* it shall be the duty of the Secretary, &c."

Section five of this act, relied upon by appellee, provides for innocent purchasers from the railroad company. But there are no innocent purchasers from any railroad company in this case.

It is the uniform holding in the Department of Justice

that this act applies only to railroad land grants. In the Department of the Interior also this construction of the act obtains.

In the contest of Rufus H. King vs. The Eastern Oregon Land Company, the Department of the Interior made the following decision December 26th, 1896:

Department of the Interior,

Washington, D. C., December 26, 1896.

Rufus H. King,

vs.

The Eastern Oregon Land Company.

Railroad Land Act of March 3, 1887.

The Commissioner of the General Land Office:

Sir—The land in this controversy is the southeast quarter of section 27, township 2 south, of range 16 east, The Dalles Land District, Oregon, and is within the limits of that portion of the grant made by the act of July 2, 1864, (13 Stat., 356,) to the Northern Pacific Railroad Company, which was forfeited by act of September 29, 1890, (26 Stat., 496,) as well as within the limits of the grant made by the act of February 25, 1867, (14 Stat., 409,) to aid in the construction of The Dalles Military Road.

The grant to the Northern Pacific Road being prior, defeated the grant to The Dalles Road, to the extent of the overlap, and your office included the unpatented lands in said limits in the restoration of the forfeited lands of the Northern Pacific Railroad. Under this restoration Rufus H. King made homestead entry No. 4922 of said land, on October 1, 1893, and made proof on the day appointed there-

for. The Eastern Oregon Land Company filed a protest against the admission of such proof, claiming a prior right, as a purchaser from The Dalles Military Road Company, and by reason thereof, the preference right to purchase said land, under the act of March 3, 1887, (24 Stat., 556).

The entryman made proof, and evidence was submitted by the protestant in support of its claim. On July 20th, 1895, the local office decided in favor of the entryman.

The Company appealed. Your office on April 23, 1896, reversed the decision of the local officers and sustained the company's protest.

The entryman appeals to the Department. The question arises: Does the act of Congress of March 3, 1887, supra, entitled, "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned land, and for other purposes," extend to lands granted to the State of Oregon, to aid in the construction of wagon-roads in said State?

It is a rule of construction that remedial statutes are to be liberally constructed so as to suppress the mischief and advance the remedy. But this rule is only applicable when the words of the statute will admit of its application.

When they are plain and clearly define its scope and limit, construction cannot extend it. "If we depart from the plain and obvious meaning, we do not in truth construe the act, but alter it. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreaing it."

Southerland on Statutory Construction, p. 430, p. 556.

The statute under consideration is plain, precise and un-

ambiguous, and, by its terms, only applies to grants of land to railroads.

It has recently been held by the Department that said act "relates specifically to the adjustment of railroad grants," and that it does not apply to a suit instituted for the recovery of title to lands certified on account of a wagon road grant in the State of Oregon.

California and Oregon Land Company, 22 L. D., 170.

I am therefore of the opinion that the decision of the register and receiver, recommending that King's entry be approved for patent and the company's protest dismissed, should be affirmed.

Your office decision is reversed, and the papers are herewith returned.

Very respectfully,

DAVID R. FRANCIS,

Secretary.

See also Secretary's Decisions in

16 Land Decisions, pp. 459-461.

17 Land Decisions, pp. 432-437.

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## LATERAL LIMITS OF THE GRANT.

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It is claimed in counsel's brief that the grant to the Nor-

thern Pacific Railroad Company in no event could exceed twenty miles from the line of the road in a State; and this without regard to whether the line of the road was in the State or in an adjoining Territory. This is not the language of the act, and is not the construction put upon it by the Land Department or the Courts.

The act of July 2nd, 1864, reads, "to the amount of twenty alternate sections per mile on each side of said railroad line as said Company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any State."

In the case of Denny vs. Dodson, 32 Federal Rep., p. 910, Judge Deady, having this same grant to the Northern Pacific Railroad before him for consideration, says:

"But independently of this consideration, there does not appear to be any serious question as to the lateral extent of the grant. The act of Congress makes that depend upon the location of the road, whether in a Territory or in a State. If in the former, the grant has twice the extent that it has when located in the latter. It is the place of location which determines this matter. The nearness of the line to any other Territory or State has nothing to do with it. Such an understanding has been the uniform ruling of the Department and that mode of determining the lateral extent of the grant is the only practicable one."

In construing grants by the Government of this nature the rule is settled that as between the Government and the grantee company the construction will be against the grantee. In R. R. Co. vs. Litchfield, 23 How., 66, the Supreme Court says:

"All grants of this description are strictly construed against the grantee. Nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands upon the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed they cannot be implied."

This language is quoted and approved in Leavenworth R. R. Co. vs. U. S., 92 U. S., 733, and the Court there adds:

"And if a right be asserted against the Government it must be so clearly defined that there can be no question of the purpose of Congress to confer it. In other words, what is not given expressly or by necessary implication is withheld."

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## PUBLIC LANDS.

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The grant to the State of Oregon of February 25, 1867, is "alternate sections of public land."

It is clear that if the lands, title to which is involved in this controversy, were not "public lands" on February 25, 1867, they did not pass to the State under the act.

The Supreme Court of the United States has in every case where the question was presented to it as to what were "*public lands*" within the meaning of railroad land grant acts, decided that this term did not include lands reserved

for any purpose or in any manner or to which a claim of any kind whatever had attached.

In Wilcox vs. Jackson, 13 Peters, 498, 513, the Court said:

"We go further and say that whenever a tract of land shall have been once legally appropriated to any purpose from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, proclamation or sale would be construed to embrace or operate upon it, although no reservation was made of it."

In Leavenworth R. R. Co. vs United States, 92 U. S., 733, the Supreme Court quotes this portion of the opinion in Wilcox vs. Jackson, and adds:

"It may be said that it was not necessary for the Court in deciding the case to pass upon this question, but, however this may be, the principle asserted is sound and reasonable, and we adopt it as a rule of construction. * * * * * "Every tract set apart for some special use is reserved to the Government, to enable it to enforce that use. And there is no difference in this respect whether it be appropriated for Indian occupancy or for other purposes. There is an equal obligation resting on the Government to see that neither class of reservations is deviated from the uses to which it is assigned."

In Newhall vs. Sanger, 92 U. S., 761, the question again came up and the Court said:

"The subject of grants of land to aid in constructing works of internal improvement was fully considered at the present

term, in Leavenworth, Lawrence & Galveston R. R. Co. vs. U. S., (Ante, 634).

"We held that they attached only to so much of our national domain as might be sold or otherwise disposed of, and that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves. Our decision confined a grant of every alternate section of "land" to such whereto the complete title was absolutely vested in the United States. The acts which govern this case are more explicit, and leave less room for construction. The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could, on the location of the road, the order withdrawing lands from pre-emption, private entry and sale, apply."

In Kansas City Ry. Co., Dunmeyer 113, U. S., 629, the Court held that a homestead entry having attached previous to the grant to the railroad company took the lands out of the grant, although the entryman abandoned his claim."

Mr. Justice Miller, delivering the opinion, said:

"It is argued by the company that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed, the exception no longer operated, and the land reverted to the company—that the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception.

"We are unable to perceive the force of this proposition."

* * * * * *

"No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations for forts and other purposes which have been given up or abandoned as such reservation, and were of great value. Nor is it understood that, in any case where lands have been otherwise disposed of, their reversion to the government brought them within the grant."

* * * * * *

"Of all the words in the English language this word attached was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

Mr. Justice Field dissented in the Leavenworth case .92

U. S., 733, supra, but subsequently in Bardon vs. The Northern Pacific Railroad Company, 145 U. S., 535, he wrote the opinion of the Court, and says:

"Three justices, of whom the writer of this opinion was one, dissented from the majority of the Court in the Leavenworth case; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the Government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

* * * * * *

"Land to which any claim or right of others has attached does not fall within the designation of public land."

R. R. Co. vs. Whitney, 132 U. S., 357.

R. R. Co. vs. Alling, 99 U. S., 463.

Van Wyck vs. Knevals, 106 U. S., 360.

Desert Salt Co. vs. Tarpey, 142 U. S., 241.

N. P. R. R. Co. vs. Sanders, 49 Fed. Rep., 132-3.

U. S. vs. N. P. R. R. Co., 41 Fed. Rep., 845.

Denny vs. Dodson, 32 Fed. Rep., 903.

Upon this point we particularly call the Court's attention to the language of the Supreme Court in the case of the United States vs. Northern Pacific Railroad Company, 152 U. S., 284.

In that case the Court had this Northern Pacific grant before it—the grant by the joint resolution of May 31, 1870, insofar as the same affected lands between Portland and Tacoma.

The lands in dispute in that case had been granted to the Oregon Central Railroad Co., May 4th, 1870. This grant was forfeited January 31, 1885. The lands were also included in the grant to the Northern Pacific Railroad Company by the resolution May 31, 1870. The Northern Pacific Company claimed that by reason of the forfeiture of the grant to the O. & C. these lands went to them. But the Court held otherwise, and said. (Page 298-9):

"So that the rights of the Oregon Central Railroad Company, whose grant preceded that to the Northern Pacific Railroad Company of May 31, 1870, by nearly one month, attached, as of the date of its grant, although the latter company filed a map of general route before the former filed a map of definite location the lands in question *had been disposed of by the United States* prior to the passage of the joint resolution of May 31, 1870, namely, by the act of May 4, 1870, granting lands to the Oregon Central Railroad Company in aid of the construction of its road. And as they were embraced by the latter grant, and were not included in any other grant then existing, *they were not public lands* within the meaning of the grant of May 31, 1870, to the Northern Pacific Railroad Company, and were, consequently, excepted out of that grant as having been *previously* disposed of by the United States.

When, therefore, Congress by the act of 1885, forfeited to the United States and restored to the public domain so much of the lands granted by act of May 4, 1870, for the benefit of the Oregon Central Railroad Company, as were adjacent to and coterminous with the uncompleted portions of the road, *the United States was reinvested with the title for its own benefit exclusively.* And the title did not pass to the Northern Pacific Railroad Company by reason of the failure of the Oregon Central Railroad Company to construct its road, or because of the subsequent forfeiture of the latter's rights by the act of 1885. The restoration to the public domain of the lands so forfeited took from the Northern Pacific Railroad Company no lands granted to it by the act of 1870."

This decision is directly in point. If the lands in that case "were not public lands within the meaning of the grant of May 31, 1870," because they "had been disposed of by the United States" by act of May 4, 1870, certainly the lands involved in this controversy "were not public lands within the meaning of the" act of February 25, 1867, because they "had been disposed of by the United States," by the act of July 2, 1864.

As to these lands, therefore, the State of Oregon took nothing by its grant of February 25, 1867, and the patents described in the bill should not be cancelled.

U. S. vs. Stone, 2 Wallace, 525.

*The grant to the Northern Pacific Railroad Company was by the act of July 2, 1864, and not by the Joint Resolution of May 31, 1870.*

It has been claimed that, as to lands on the "branch"

from Wallula to Portland, there was no grant of lands until the passage of the joint resolution of May 31, 1870.

It will be observed that in section three of the act of July 2, 1864,—the section which makes the grant—the words "main line," or "branch," do not occur. There is no qualification to the grant as applying to the "main line" only. It is claimed now that designating one portion of the road "Main Line" confers upon that portion greater rights than are to be accorded to the "branch." This contention is not sound. The term "Main Line" is not a distinction, but a description merely. It is used in the first section of the act. The line from Lake Superior to Puget Sound is called the main line, and the line running down from the main line to Portland is called the branch. These lines were so designated presumably on account of their relative length. The terms "long line" and "short line" would have answered the purpose equally as well. Why the terms "main line" and "branch" were chosen it is unnecessary to consider, except to say that they are appropriate. No change was made up to the passing of the joint resolution of May 31, 1870. Up to that time the building of the road had not progressed. No power was given by the act of 1864 to *mortgage the land grants*. It was found that without such power funds could not be obtained to carry on the work. Hence the resolution of May 31, 1870. The joint resolution of April 10, 1869, was a useless piece of legislation, and the company did not act under it, because while it authorized the extension of the branch from Portland to the Sound, it made no land grant for such extension and gave no right to mortgage anything but the right of way, roadbed and telegraph line, which power was given by the act of March 1, 1869.

By that time it was also found to be advantageous to build down the valley of the Columbia to Portland, *and from Portland to Puget Sound.* Portland was then the metropolis of Oregon and the largest city in the Northwest. The towns which have since grown to be cities on the Sound were small, and in the way of furnishing business for a railroad were comparatively unimportant. It was desirable, therefore, to build to Portland first, to the end that business might be secured at once for the new road. There was another reason. It was well known to those whose business it was to find out, that a road from the Upper Columbia over the Cascade Mountains to Puget Sound would be very difficult to build, and it was doubted whether a pass would be found through the Cascades and whether it would be possible to ever build the portion of the road from Wallula over the mountains to the Sound. The object of the act of 1864 being to connect the East with the Pacific Ocean, if the line over the Cascades failed the road must necessarily run down the valley of the Columbia to Portland, and thence to Puget Sound. In order to provide for the building of this road a new land grant was necessary—*from Portland to the Sound.* The joint resolution of 1869 gave the company the right to build this extension, but made no grant of lands, and it failed. Therefore, in the joint resolution of May 31, 1870, we find this provision:

"Also to locate and construct under the provisions and with the privileges *grants* and duties provided for in this act of incorporation its *main road* to some point on Puget Sound *via the valley of the Columbia river* with the right to construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound."

The reason why the terms "branch" and "main line" in the act of 1864 were transposed in this joint resolution is not apparent unless Congress and the company, knowing that the line down the valley of the Columbia *could* be built, and being uncertain of the feasibility of building over the Cascades, proposed to designate that portion "main line" which was most likely to be constructed.

Attention has been called to the fact that in the indemnity clause in the resolution of May 31, 1870, these words occur: "To the amount of lands that have been *granted* sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of *subsequent to the passage of the act of July 2, 1864.*"

It is claimed that these italicised words "*subsequent to the passage of the act of July 2, 1864,*" refer to all the lands from Wallula down. This is unreasonable. If these words apply to the lands from Wallula to Portland, they apply to the lands from Wallula across the mountains to the Sound, and there was no grant to the line of road over the mountains by the act of 1864. And nobody has ever claimed that. The indemnity for lands "granted subsequent to the passage of the act of July 2, 1864," referred solely to the new grant from Portland to the Sound. It was intended that this new grant from Portland to the Sound should stand on the same footing with the old grant.

This is the more apparent from what immediately follows in the resolution:

"And that twenty-five miles of said main line between its Western terminus and the City of Portland, in the State of Oregon, shall be completed by the first day of January, 1872,

and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points."

It was claimed in the argument in the Court below that the decision of the Supreme Court in United States vs. The Northern Pacific Railroad Company, 152 U. S., 284, sustains appellees' contention in this regard. But that case holds nothing of the kind. The controversy in that case was over lands lying between Portland and Puget Sound upon the line of road not provided for by the act of 1864, but authorized by the joint resolution of 1870, and the Court said, (p. 294):

"We cannot agree that this resolution is to be held in this respect as simply a recognition by Congress of an existing right in the company to locate and construct a road from Portland to Puget Sound with the right to obtain lands in aid thereof as provided in the act of 1864. On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a new road not before contemplated that would directly connect Portland and its vicinity with Puget Sound."

This decision, we insist, not only does not sustain appellees' position, but is a conclusive refutation of that claim.

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## THE PERHAM MAP.

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The map of the general route, filed by the Company March 6, 1875, is known as the Perham Map. As to the lands

granted to the Company for the branch from Wallula to Portland, this map is sufficient as a map of general route. It is not necessary to consider whether it is sufficiently definite on the main line farther East.

In Buttzz vs. The Northern Pacific Railroad Company, 119 U. S., p. 55, the Supreme Court had under consideration this very act of July 2, 1864, and was passing upon the point raised by counsel as to when the general route of the road might be considered as fixed. In deciding that point the Court uses this language:

"The third section declares that after the general route shall be fixed, the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line, as fast as may be requried for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or pre-emption, before or after they are surveyed, except by the company. The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country, *or from a knowledge of it* and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the land department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the In-

terior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the land department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases, to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove useless."

In St. Paul and Pacific R. R. Co. vs. The Northern Pacific R. R. Co., 139 U. S., p. 19, the Court, in construing this act of July 2, 1864, says:

"It is indeed contended that there is no evidence that any general route was fixed, meaning thereby the general route for the whole length of the road. If this were the fact, which is not conceded, the result would not be changed, as supposed by counsel. The contemplated railroad from Lake Superior to Puget Sound was about two thousand miles in length, and it was not expected that there should be a general designation of the whole route over this distance before any land should be withdrawn or any rights of the company should attach. The general purpose of the act was accomplished if such reasonable portions of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company. The withdrawal in any

case would extend along the route which was fixed, and a map of which was filed in the department."

Under these authorities this Perham map, insofar as the grant from Wallula to Portland is concerned, was such a map of general route as was contemplated in the third section of the act of 1864. It was, from the nature of the country, practically the only map that ever could be filed. True, no withdrawal of lands was made by the Commissioner of the General Land Office upon the filing of this map. But the action of the land department with reference to the map is not important. There is no provision in the act of 1864 that contemplates an approval of the map of general route by the Commissioner of the General Land Office or the Secretary of the Interior. The act contained a legislative withdrawal within itself upon the *filing of the map*. In this respect it differed from nearly all the land grant acts up to that time.

And it was this difference, or in the overlooking of it rather, that led the Commissioner of the General Land Office into the error contained in his letter to the Secretary of the Interior of June 22, 1865. Transcript of Record, pp. 68-69

This is sufficiently shown by comparing the description of a map of general route in Bultz vs. Northern Pacific R. R. Co., supra, and the commissioner's description, which is:

"The evidence required of the route under the established ruling of the department is a *connected map* showing the exact location; the map indicating by flagstaffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee. That proof is required to show the precise portions of each section, or smallest legal subdivisions cut by the route."

The commissioner was evidently mistaken as to what contituted a map of general route under the act. But this mistake could not affect the company. The company had filed its map, and by so doing had complied with the act. The refusal of the Commissioner to order a withdrawal upon the filing of this Perham map, so far as the branch road is concerned, did not defeat the legislative withdrawal provided for in the act upon the filing of such a map. The rights of the company were the same irrespective of the action of the Commissioner.

"It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do and he fails to obtain his right by the misconduct or neglect of a public official, the laws will protect him."

Lyttle et al vs. The State of Arkansas, 9, How., 333.

Shepley vs. Cowan, 91 U. S., 339.

This map remained on file in theLand Department as a public record. It must be presumed that the act of February 25, 1867, was passed by Congress with a full knowledge of the existence of this map and its legal effect, and that the State of Oregon took its grant with a like knowledge.

In 1867, when the State of Oregon took its grant, the Northern Pacific Company had a qualified title to these lands by the location of the branch road "down the valley of the Columbia," by the act of 1864, and by the filing of the Perham map, and a survey or filing of any other map was necessary only to particularize the odd sections within the limits of the grant.

In construing the acts of 1864 and 1867 it is the duty of

the Court to ascertain and give effect to the intention of Congress in passing those acts.

U. S. vs. Southern Pacific Co., 146 U. S., 570.

Winona & St. Paul R. R. Co. vs. Barney, 113 U. S., 618.

Considering the length of the road, the condition of the country through which it passed, the difficulties, engineering and financial, which attended its construction at all, the length of time allowed for its construction—twelve years by the act (subsequently increased to sixteen years)—it would be unreasonable to assume that Congress within three years from the passage of the act, intended to take away any portion of the land granted the Northern Pacific Company.

Title to these lands was vested by the act in the Northern Pacific Company upon condition subsequent, and that title remained in said Company until Congress declared a forfeiture of it for the non-performance of such condition subsequent. No person or corporation could assert any valid claim to said lands until after such forfeiture was declared.

Schulenberg vs. Harriman, 21 Wallace, 63.

Something is claimed by reason of the acquiescence of the Northern Pacific Company in the refusal of the Commissioner to order a withdrawal on the Perham map. But there was no acquiescence. The commissioner declined to order a withdrawal, and there was no law to compel him to do it. The Company kept on asking for withdrawal, and endeavoring in every way to the best of its abiltiy to overcome the objections of the Land Office.

## THE WORD "GRANTED" IN THE EXCEPTIONS TO THE GRANT IN SEC. 3 OF THE ACT OF 1864.

It is claimed by appellant that it is aided by the exception contained in the grant of July 2, 1864, and that where the act excepts out of the grant lands "reserved, sold, *granted* or otherwise appropriated," etc., Congress had in contemplation this subsequent "*grant*" to the State of Oregon," or some similar one. On principle this is unsound. By authority it is completely overthrown. The law is settled by the Supreme Court that the exceptions in a grant to a railroad company are not for the benefit of, and cannot be taken advantage of by, another railroad company with a subsequent grant, where the two grants conflict.

In the case of the M. T. & K. Ry. Co. vs. The K. & P. Ry. Co., 97 U. S., 491, the reservation was of "lands" sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had attached ,and "mineral lands." And the Court, speaking of this reservation in the grant says: "It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads."

It will not do to say that this is dictum. It is *not* dictum. The very question, and the only question in that case was, as to the right of two railroads under conflicting grants. One road received its grant in July, 1862, the other in March, 1863.And the Court said, speaking of the grant of 1863:

"Upon the principle already announced in considering the time when the grant to the plaintiff took effect, the title of the defendant to the lands thus set apart to it, had there been no previous disposition or reservation of them, would have become perfect and by relation have vested from the date of the act. But so far as the lands were identical with those covered by the previous grant to the plaintiff by the acts of 1862 and 1864 the title could not attach, as it had already passed from the Government."

True, the word "granted" is not included in the description of the lands reserved, but certainly it is no stronger word than the words used, and might well be included in the phrase "or otherwise disposed of." If the lands in that case were not reserved out of the grant it is difficult to see why they should be in this.

But that there may be no question as to the proper construction of this reservation in the act of July 2, 1864, we ask the Court's consideration of the case of the St. Paul and Pacific Railroad, 139 U. S., pp. 1 to 19.

The facts in that case were as follows:

By the act of March 3, 1857, lands were granted to the Minnesota and Pacific Railroad Company, which afterwards became the St. Paul and Pacific. Some of the lands thus granted were the same as those afterwards granted to the Northern by act of July 2, 1864.

The route of the M. & P. Ry. was subsequently changed by joint resolution of Congress, July 12, 1862.

By act of Congress, March 3, 1865, this joint resolution was repealed, and the lands granted by the act of 1857 were again granted to the St. Paul and Pacific Company.

By act of Congress, March 3, 1871, the route of the St. Paul and Pacific was again changed, and other lands granted it in consideration of its reliquishing those previously granted on certain portions of its route. The identical point was raised there as here, namely, that the grant to the Northern Pacific reserved lands which might subsequently be granted to some other Company, as they were in that case subsequently granted to the St. Paul and Pacific. The Supreme Court holds against such a construction, and says: "But independently of this conclusion we are of opinion that the exception in the act of making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embod a provision which would often be repugnant to and defeat the grant itself."

This decision is conclusive of the question raised here. This is certainly not dictum. By reference to this case, as it was tried and decided in the Court below, it will be seen that the very point urged here was relied on there, and that the decision of the case in a great measure depended on the decision of that point. The case is reported in the 26th Fed. Rep., 551, and for the convenience of the Court we quote the following from the opinion, pp. 557, 558:

"Assuming the priority of the Northern Pacific grant, it is earnestly contended that by its terms all subsequent grants made prior to the definite location of its road are excepted. The definite location, it is conceded, was not made until after the act of 1871. The difference between the language of the grant to the Union Pacific, construed in 97 U. S., supra, and that in the grant to the Northern Pacific, is the basis of this argument. The former grant reads thus:

"Five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed."

12 St. at Large, 492, Sec. 3.

In the latter we find these words:

"And whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever, or prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The question is as to the intent of Congress in these acts; for as to its power as owner to dispose of these lands as it pleases, there can be no question. In Missouri, K. & T. Ry. Co. vs. Kansas Pacific Ry. Co., 97 U. S., 497, the Supreme Court said:

"It is always to be borne in mind in construing a congressional grant that the act by which it is made a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should

not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land, and that where no such power exists, instruments with words of present grant are operative, if at all, only as contracts to convey. But the rules of the common law must yield to this, as in all other causes, to the legislative will."

We are not limited, therefore, to the technical force and meaning of terms as used in conveyances and contracts between individuals. We must construe this act as any other law of Congress, and ascertain from all means at command the intent of the legislator. Stress is laid on the use of the word "granted" in the one act, and its omission from the other. This word, it is claimed, has a well-recognized meaning in the land legislation of Congress, distinct from "sale," "pre-emption" and "homestead." Its use indicates the intention of future grants within this territory, and notifies the grantee that such future grants, if made before its definite location, will have precedence. In fact it reserves from this all such future grants. The vastness of this grant, and the wide range given for the location of the road, are suggested as the reasons why Congress increased the exceptions previously made to the Union Pacific act. The fact, as stated, that this is the only land grant act in which this word is used in a similar connection is noticed as evidence of the intent. At the hearing, the arguments in favor of these views were forcibly presented and seemed to me very persuasive. Subsequent reflection has led me to a different conclusion. I state briefly my reasons. The decision in 97 U. S., supra, places all land grant roads on the same plane

—and that, a different one from that occupied by settlers and private purchasers—and settles all conflicts of title by a rule clear, simple and just, viz: priority of grant. Congress may fairly be regarded as standing indifferent between all roads, and intending to apply this just and simple rule of priority as between successive beneficiaries. Before any departure from such intent is adjudged, the fact should be made clear. The burden is on the latter beneficiary averring such departure. The language of each act is broad, and covers every possible disposition by the Government intermediate the act and the location. "Sold, reserved, or otherwise disposed of" in one, "reserved," sold, *granted* or otherwise appropriated" in the other. Is any term broader or more comprehensive than "disposed of?" Used in a similar private contract between individuals, would anyone doubt the sweep of the exception? Yet the Supreme Court ruled that it did not except "any portion of the designated lands for the purpose of aiding in the construction of other roads." Counsel would limit the scope of the term on the principle *noscitur a sociis*. The use of the qualifying word "otherwise" makes against the application of that principle. But, giving it full force, is not a grant a disposition kindred to a sale, if not a reservation? Counsel's argument rests on the technical force of the phraseology, while I understand the Supreme Court to base the rule on the presumed attitude of Congress towards such public improvements. While the grant is vast, the line to be constructed in order to earn it is continental. The grant was made because Congress believed the public good required the road, and in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it

is fairer to presume that Congress intended the freest bounty, rather than to believe that it burdened the grant with extra exceptions, which, when construction became feasible, might largely deplete it of value. Further, Congress had in thought at the time other railroad grants,and in the first proviso made special provision therefor. It there deducted from this grant any lands theretofore granted to any road whose line should prove to be upon the same general route, and authorized consolidation of companies. Without consolidation, the Northern Pacific would fail of such lands, and that without any right of indemnity elsewhere along its line. If further special provision for conflict with other land grants was intended, would not such intention have been made manifest by further proviso, or at least by language of unmistakable import? I can but think the rule laid down in 97 U. S., supra, applicable to the Northern Pacific land grant, and therefore must hold that its title to the lands in place antedates that of the defendant."

In the light of these authorities counsel's position is untenable. These lands were not reserved out of the grant to the Northern Pacific Company because of the use of the word "granted," and the State of Oregon took nothing by the act of 1867, as far as these particular lands are concerned.

Upon this point we call the Court's attention to the decision of the Supreme Court in the case of the United States vs. The Southern Pacific Co., 146 U. S,. 570.

This Court is familiar with the facts in that case. In deciding the case the Supreme Court says (pp. 604-6-7):

"Again, it is urged that the grant to the Atlantic and Pacific Railroad Company having been forfeited, there is noth-

ing now in the way of the Southern Pacific Railroad Company's grant attaching to these lands; that in the interpretation of rights under land grants, regard has always been had by this Court to the intention of Congress; that it was the intention of Congress that these lands should pass to some Atlantic and Pacific Railroad Company or the Southern Pacific Railroad Company; that they cannot now be applied to aid in the construction of the former company's road; and that, therefore, to carry into effect the intent of Congres, they should be applied to aid in the construction of the latter company's line. We think this contention is erroneous, both as to the law and to the intent of Congress.

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"Indeed, the intent of Congress in all railroad land grants as has been understood and declared by this Court again and again, is that such grants operate at a fixed time, and shall take only such lands as at that time are public lands, and, therefore, grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands."

* * * * * *

"Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Con-

gress could interfere with this right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic and Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture of its own benefit"

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## THE JOINT RESOLUTION OF MAY 31, 1870.

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It was urged on the trial in the Court below that the joint resolution of May 31, 1870, was not an amendment to the act of 1864, but was a "complete piece of legislation" in itself.

This, we submit, is not correct. This resolution could not stand alone. Without reference to the act of 1864 it is a meaningless thing. In interpreting this resolution reference must be constantly made to the act of 1864. It starts out by authorizing the company to issue bonds and "secure the same by mortgage upon its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchises as a corporation." To what "property" and "franchises" is reference made here? Without the act of 1864 there could be no answer. It refers to the "priv-

ileges, grants and duties provided for in its act of incorporation." What privlieges, grants and duties? Again the answer is found in the act of 1864.

All that this resolution does is to amend the act of 1864 by:

First—Authorizing the company to mortgage its land grant (which before it could not do).

Second—Changing the designation of the road down the Columbia River from "Branch" to "Main Line," and the road across the Cascades from "Main Line" to "Branch."

Third— Providing an additional ten miles on each side of the line of the road for indemnity lands.

Fourth—Making a new grant from Portland to Puget Sound.

Otherwise the act of 1864 remains in full force and effect, and all the other sections of the act of 1864 apply to the new grant from Portland to Puget Sound.

This resolution is a legislative recognition of the right of the company to these lands.

By authorizing the company to mortgage them Congress indicated clearly enough that it was not then understood that any other company had any right to them. As was said by the Circuit Judge in

Denny vs. Dodson, 32 Fed. R., 903.

"But, in advance of the construction of the road and telegraph line, or of particular portions, the lands could not be used without the permission of Congress, so as to cut off the rights of the United States mentioned above. Such per-

mission was given when, on the thirty-first of May, 1870, by joint resolution of the two houses, Congress authorized the company to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property, of all kinds and description, real, personal, and mixed, including its franchise as a corporation. In the property mentioned, the lands granted to the company are included. It can hardly be supposed that Congress would have allowed this mortgage if the company had no legal title to the lands which could be held as security for the moneys advanced on the bonds and transferred by sale upon foreclosure, in case default should be made in their payment. To suppose that Congress would sanction such a proceeding would be to impute to it complicity in a fraud, which cannot be entertained for a moment. The conclusion follows that it allowed the execution of the mortgage because it had transferred to the company a title to the lands covered by its grant, which could in this way be made available to raise funds for the work."

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## THE MAP OF AUGUST 13, 1870.

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It is immaterial whether we call the map of 1870 a map of "general route" or of definite location." So far as appears it was filed as soon as it was practicable to file it. Insofar as concerns the road from Wallula to Portland, it is identical with the Perham map. Under this map a withdrawal of all these lands was ordered by the officers of the Land Department. This map is a recognition of the Perham map, and

shows that there was a legislative withdrawal at the time of filing the Perham map. Any uncertainty or change as to the main line did not affect the branch line, which remained unchanged from the beginning.

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## THE ACT OF SEPTEMBER 29, 1890—FORFEITURE ACT.

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A reference to the forfeiture act shows conclusively that Congress considered that by that act these lands were forfeited. The first section of the act provides for the forfeiture of unearned grants, and says:

"*And the United States hereby resumes title thereto.*"

* * * * * *

"*And all such lands are declared to be part of the public domain.*"

In the fifth section provision is made for confirming title to "lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain north of the line known as the Harrison line, drawn from Wallula, Washington, easterly," etc. Also for

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"rights of way and riparian rights, heretofore attempted to be conveyed to the City of Portland, in the State of Oregon,

by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August 8th, 1886, (descriptive of lands) * * *forfeited by this act are hereby confirmed unto the said City of Portland.*

The lands above described as being confirmed to the City of Portland are with reference to the Northern Pacific grant situated similarly to the lands in controversy here.

If the contention of appellee is correct here, this legislation was entirely unnecessary. But Congress did not think so, because in the act these lands are described as "forfeited by this act." If a part of the lands from Wallula to Portland were forfeited it needs no argument to show that they were all forfeited.

That there might be no doubt as to the meaning of the act and plainly intending to provide against any misunderstanding of the effect of the act upon overlapping grants (such as arises in this case) the 6th section of the act says:

"Sec. 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit *of any state or corporations to which lands may have been granted by Congress* except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, *or to confer any right upon any state, corporation or person* lands which are excepted from such grant. Nor shall the moity of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines

has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line."

While the decisions of the Secretary of the Interior are not authority, yet as to questions involving title to public lands, they are entitled to and have always been accorded great respect by the courts.

In this connection, therefore, we call the Court's attention to the letter of Secretary Noble, Secretary of the Interior to the Commissioner of the General Land Office, dated February 17, 1892.

Every proposition made by appellee here was contented for in a protest then before the Secretary for consideration and made by the Oregon and California against the decision of the Commissioner of the General Land Office, holding these lands as forfeited by the act of September 29, 1890, and the Secretary overruled all the objections of contestants and held the lands as forfeited.

*The case of The Oregon & California Railroad Company vs. the United States.* (77 Fed. Rep., p. 67).

We are not unmindful of the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of the United States vs. The Oregon and California Railroad Company, now on appeal in this court.

But we submit that the decision of the majority of the court in that case is erroneous and should be reversed. Judge McKenna dissented, and as a part of this argument we submit

the following portion of his dissenting opinion. (77 Fed. Rep., p. 77-82.

"Many phases of railroad land grant cases have been presented to the Supreme Court, and have been so firmly established as to become postulates. These are: That grants of that kind are grants *in praesenti*, in the nature of a float. That they do not attach to specific sections until identification by a map of definite location of the road. That, within what has been called "common granted or primary limits," the date of the grant is the determinative fact in contending railway grants, not the date of location,—giving, if prior, priority of right; if at the same time, equality of right (that is giving the land in equal, undivided moities); in neither case can an advantage be secured by priority of location or of construction. That the condition of building the road is a condition subsequent, the right and grant continuing until forfeiture by or entry by the United States. And that the forfeiture or entry, in the absence of explicit legislative declaration, is for the benefit of the United States, not for the benefit of subsequent grantees. Applying these principles, and the principle that we have seen is likewise established, to-wit, that subsequent grants to railroads are not within the reservations of prior ones, how should the question in this case be answered? The last principle expressed removes, as irrelevant to contests between railway grants, maps of general route or of definite location. They only have purpose to the objects of the reservations, to-wit, settlers (homestead or pre-emption), not railroads. As to these (that is as to railroads), we can only have regard to the date of the grant and the rights conveyed. I cannot see (and I say it with deference) that the consequence, though it inevitably follows, that, if the lands in controversy be deemed appropriated by

the Northern Pacific act, all lands situated north of the forty-fifth degree of latitude must have been withdrawn, is very embarrassing To what is it embarrassing? To settlers, —to the occupation and development of the country under the land laws? Not at all. This is prevented by the reservations in the grant. To other railroad companies? Grants to these was not a constant, but an occasional policy, and dependent so much upon special circumstances as to require (certainly not necessarily to include) a right of selection of route in a wide territory. If this was to be primarily guarded against, or to be afterwards corrected, the remedy was in Congress and obvious. But it does not inevitably follow that all the land north of the forty-fifth degree of latitude was withdrawn. The grant had a limitation, and a practical one, too. The right was not to run the road anywhere north of the forty-fifth degree of latitude, but from a point on Lake Superior to a point on Puget Sound, by the most direct, eligible route. The Supreme Court said in U. S. vs. Northern Pacific Railroad Company, supra:

"Although that act allowed the company to adopt the most eligible route, within the territory of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound, which would not touch any point, 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget Sound, and, in addition, a branch line leaving the main trunk line at some suitable place, not more than three hundred miles from its western terminus, and extending 'via the valley of the Columbia river to a point at or near Portland.' If the main line, as originally indicated by the act of 1864, had been established on the route between

Portland and Puget Sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus, and extended via the valley of the Columbia river to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country north of the forty-fifth degree of latitude. On the contrary, as said in St. Paul & P. R. Co vs. Northern Pac. R. Co., 139 U. .S. 1, 13, 11 Sup. Ct. 389, 393: 'When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.' "

I have said as to contesting railroad grants, we do not regard maps, either of general route, or of definite location, but only the date of the grants, and the rights conveyed by them. There are two,—one ultimate and the other provisional. The ultimate one gives a title to a certain number (20 in the territories, 10 in the states) of specific sections. The provisional gives a power of selection of these from a wider extent of territory. Is it not a substantial and necessary right? May it exist in fullness, and with power to exercise, in two railroad companies at the same time? Manifestly not. May it exist in them in succession, or, rather, suspended in one until default in the other? If so, when comes default, and how? In the answer to the first of these questions, it must, of course, be conceeded that congress has the power to grant a right in the public lands expectant or conditional upon the non-accruing of another, and probably the reasons

for its existence, or the embarrassments of a contrary view, have not been, and cannot be, put more strongly than the ability of counsel have put them in this case. But the same reasoning was urged in one of the first railroad land grant cases. Leavenworth, L. & G. R. Co. vs. U. S., 92 U. S. 733. It was urged in the last. U. S. vs. Southern Pac. R. Company, 146 United States, 570, 13 Supreme Court, 152. It formed the basis of the able dissenting opinions in both cases, but the majority of the Court has firmly resisted it—given always the same answer to it: That Congress, in any of its grants, cannot be supposed to have thereby intended to include land previously assigned for another purpose, that it did not intend to cause or invite vexatious conflicts, and that it only concerned the United States what became of land claims to which were abandoned or forfeited. In U. S. vs. Southern Pac. R. Co., supra, the lands in controversy lay within the granted limits of the Atlantic & Pacific and Southern Pacific Companies, at the crossing of their lines as definitely located. Congress passed an act forfeiting the grant to the Atlantic & Pacific Company, and it was claimed by the Southern Pacific Company under its grant. The Southern Pacific Company filed its map April 3, 1871,—more than a year before the Atlantic & Pacific Company filed its map; and it was hence contended that, if the title of the Southern Pacific Company was displaced, it was only conditionally displaced,— that is, displaced on condition that the Atlantic & Pacific Company should, by the final completion of its road, perfect its right thereto. The Court, however, resisted the contention, and held that whatever title or right the Southern Pacific Company might acquire by a prior filing of its map was absolutely displaced when the Atlantic & Pacific Company's map was

filed. "Illy as it may accord," said Mr. Justice Brewer, "with the common law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws, as well as grants; that Congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and therefore that, in the eye of the law, it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific." Some misunderstanding may arise from the use of the word "attached" in this citation. It is manifest, however, the expression was only used to meet the language of the contention. It is manifest that there was no displacement of title. There never was any in the Southern Pacific Company to be displaced. There was an act of Congress forfeiting the title of the Atlantic & Pacific Company, and the Court held that this did not inure to the benefit of the Southern Pacific Company. The case was a controversy over the title to specific tracts. Does its principle apply to a controversy over the right of selection of specific tracts? It is said that there is a passage in the opinion which forbids such application. It is as follows:

"Indeed, the intent of Congress in all railroad land grants, as has been understood and declared by this Court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands, and therefore grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands. The question is asked: Supposing the Atlantic & Pacific Company had never located its line west of the

Colorado river; would not these lands have passed to the Southern Pacific Company under its grant? Very likely that may be so. The language of the Southern Pacific Company's grant is broad enough to include all the land along its line, and, if the grant to the Atlantic & Pacific Company had never taken effect, it may be that there is nothing that would interfere with the passage of the title to the Southern Pacific Company."

On a disputable proposition it is natural to look to any intimation of the Supreme Court, not only because of the supremacy of that tribunal, but because of the learning and abundant care which are bestowed upon its opinions. Yielding to this to the utmost, I cannot find anything authoritative in the passage. Such questions are often put, and as often answered as the Court answered that one,—or, rather, did not answer it, but only noticed,—conceding a possibility which it was not necessary to decisively affirm or deny. But the Court proceeded to say that the result supposed by the question was neither intended nor expected by Congress, and, if there had been no act of forfeiture, the Atlantic & Pacific could yet have constructed its road and secured the lands. "No power," said the Court, "but that of Congress, could interfere with this right of the Atlantic & Pacific. No one but the grantor can raise the question of a breach of a condition subsequent." This language and reasoning are applicable to every right under the granting acts, whether we consider the intention of Congress, or its power to forfeit, and the effect of its exercise of the power, and it seems to me irresistibly so. By the express declaration of the act, the grants were made, and the rights and privileges were conferred upon and accepted by the Northern Pacific Railroad Company, on the condition that it should commence work

on the road within two years from the approval of the act by the President, and complete and equip the whole road by the 4th of July, 1876; and the further condition that if the company should make any breach of the conditions of the grants, and allow the same to continue for upwards of one year, then at any time thereafter the United States might do any and all acts and things needful and necessary to insure a speedy completion of the road. Sections 8 and 9. Subsequently a joint resolution was passed by Congress, extending the time for the commencement of the road to July 2, 1868, and for its completion to July 4, 1878. 14 Stat. 355, Sec. 2. On the 31st day of May, 1870, Congress passed the joint resolution already referred to, giving the company power to make "branch line," "main line," and the latter "branch line," but neither taking away nor giving other rights. The grant to the Oregon & California Railroad Company was made on the 25th of July, 1866. But the default in commencing the road within two years, or the default in building it, either under the original act or the resolution of 1870, was no concern of the Oregon & California Railroad Company. Nor did the forfeiture of September 29, 1890, inure to its benefit. In other words, it got no rights by either the default of the Northern Pacific, or the forfeiture by the United States. By what, then, did it get rights, and when? Only by its grant, if at all. But at the date of that the right of locating its road so as to take the lands in controversy existed unimpaired in the Northern Pacific Company, under the prior grant of 1864, and continued to exist, and did exist, unimpaired in that company January 29, 1870, when the Oregon & California Company filed its map of definite location; did exist when that company built its road; did exist in 1871 and 1877, when patents were issued to that company. If not, by what

was it taken away?. Certainly not by any act of the United States, and the United States alone had the power. No act of the Oregon & California Company could do it. The default of the Northern Pacific Company, if there was any, was no concern of the Oregon & California Company. This company had no rights, except, as I have already said, those its grant gave it. It could get none from filing a map of definite location, or none by building its road, or impair none that the Northern Pacific company received by its grant. This seems very plain, but may not the reasoning be still further extended? Whatever rights passed to the Northern Pacific Company by the act of 1864 could only be lost by abandonment, or by resumption by the United States on account of non-performance of conditions. Abandonment is not claimed, and if it were, abandonment of rights, as forfeiture of rights, has always been held not to contribute to railroad grants. Were the rights of the Northern Pacific Company taken away by forfeiture? The majority of the court say no. My Brother Ross' language is:

"That the Oregon & California Railroad Company got nothing by the forfeiture of September 29, 1890, is clear; for the forfeiture was for the benefit of the government only. U. S. vs. Southern Pac. R. Co., 146 U. S. 570, 13 Sup. Ct. 152."

But, if not by that forfeiture, not at all; and the rights (and all of them) of the Northern Pacific Company still exist, and may yet be exercised. Is not this an irresistible conclusion from the cases? Do not all rights of the Northern Pacific Company, in complete fullness, exist until they shall be exercised or forfeited? Does not the right to built its road exist, and all rights necessary for that greater right also exist? Are

they not inseparable? Is not one the complement of the other? And, if so, does not the language of Justice Brewer in U. S. vs. Southern Pac. R. Co., supra, accurately apply? I think so. He said:

"Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic & Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic& Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific. It was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant, and now, finding that the Atlantic & Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture for its own benefit."

It follows from these views that the decision of the Circuit Court was correct."

Respectfully submitted.

JOHN M. GEARIN,
Solicitor and Counsel for Appellant.